Office - Supreme Court, U.S.
FILED
DEC 18 1981
STEVAS,
CLERK

No. 80-2165

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

v.

EUGENE L. HUNT,

Appellee.

On Appeal From
The United States Court of Appeals
For The Eighth Circuit

BRIEF OF AMICI CURIAE THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE

SHELDON PORTMAN
Public Defender
COUNTY OF SANTA CLARA
70 West Hedding Street
First Floor, West Wing
San Jose, California 95110
(408) 998-5121
Counsel for Amici Curiae
NATIONAL LEGAL AID
and DEFENDER ASSOCIATION
and
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
ARGUMENT	3
I. ARTICLE 1, SECTION 9, OF THE NEBRASKA CONSTITUTION VIOLATES SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF PERSONS ACCUSED OF VIOLENT SEX OFFENSES BY DEPRIVING THEM OF THEIR RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, SELF-REPRESENTATION, AND "THE FULLEST POSSIBLE DEFENSE."	3
A. The "Traditional Right Of Freedom Before Conviction" Is Directly And Significantly Related To The Rights Protected By The Sixth Amendment	3
B. The Denial Of Bail Has Severe Adverse Effects On The Exercise Of Sixth Amendment Rights	6
C. Defendants Accused Of Heinous Sex Offenses Must Be Accorded The Fullest Possible Protection Under The Sixth Amendment	10
II. ARTICLE 1, SECTION 9, OF THE NEBRASKA CONSTITUTION VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DEPRIVING PERSONS ACCUSED OF VIOLENT SEX OFFENSES OF EQUAL PROTECTION OF THE LAW	12
A. Denial Of The Right To Bail To Persons Accused Of Violent Sex Offenses Is Subject To The "Strict Scrutiny Test" Of Equal Protection	13
B. Even If Denial Of Bail Does Not Constitute Interference With A Fundamental Right, The Nebraska Bail Provision Is Invalid Under The "Rational Relationship Test"	14
C. The Latest Available Empirical Data Provides No Support For Either A "Necessary" Or A "Rational" Relationship Between The Classification Herein And Denial Of Bail	20
CONCLUSION	23

TABLE OF AUTHORITIES

CASES:	Page
Avery v. *Alabama*, 308 U.S. 444 (1940)	4
Baxstrom v. *Herold*, 383 U.S. 107 (1966)	16, 17, 18
Beasley v. *State*, 258 Ark. 84, 522 S.W.2d 365 (1975)	10
Bell v. *Wolfish*, 441 U.S. 520 (1979)	6
Bitter v. *United States*, 389 U.S. 15 (1967)	4
Boyd v. *United States*, 116 U.S. 616 (1885)	12
Coker v. *Georgia*, 433 U.S. 584 (1977)	15, 16
Coleman v. *Alabama*, 399 U.S. 1 (1970)	4
Dunn v. *Blumstein*, 405 U.S. 330 (1972)	13
Eisenstadt v. *Baird*, 405 U.S. 438 (1972)	13
Faretta v. *California*, 422 U.S. 806 (1974)	4
Furman v. *Georgia*, 408 U.S. 238 (1972)	16
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	4
Gilbert v. *California*, 388 U.S. 263 (1967)	4
Harper v. *Virginia Bd. of Elections*, 383 U.S. 663 (1964)	13
Hunt v. *Murphy*, 648 F.2d 1148 (8th Cir., 1981)	15
In re Murchison, 349 U.S. 133 (1955)	4
Jackson v. *Indiana*, 406 U.S. 715 (1972)	17, 18
Kennedy v. *State* (Wyo. 1975) 470 P.2d 372, *cert. denied*, 401 U.S. 939. Anno. 92 ALR2d 866	10
Miranda v. *Arizona*, 384 U.S. 436 (1966)	4
People v. *Carr* (Colo. App. 1975), 541 P.2d 104	10
People v. *Rincon-Pineda*, 14 Cal.3d 864, 123 Cal.Rptr. 119, 538 F.2d 247 (1975)	10, 11
Powell v. *Alabama*, 287 U.S. 45 (1932)	4
Roe v. *Wade*, 410 U.S. 113 (1973)	13
San Antonio Independent School District v. *Rodrigues*, 411 U.S. 1 (1973)	13
Skinner v. *Oklahoma*, 316 U.S. 535 (1942)	13
Smith v. *Hooey*, 393 U.S. 374 (1969)	6
Stack v. *Boyle*, 342 U.S. 1 (1951)	3, 5, 6, 12

Table of Authorities Continued

Page

United States v. *Kennedy*, 618 F.2d 557 (9th Cir., 1980) .. 15

United States v. *Venuto*, 182 F.2d 519 (3rd Cir., 1950) ... 4

Weber v. *Aetna Casualty and Surety Company*, 406 U.S. 164 (1972) 14

Wolfs v. *Britton*, 509 F.2d 304 (8th Cir., 1975) 4

STATUTES AND CONSTITUTIONAL PROVISIONS:

UNITED STATES CONSTITUTION:

Sixth Amendment ..... *passim*

Eighth Amendment 2, 13

Fourteenth Amendment 3

Neb. Const. Art. I, § 9 ..... *passim*

MISCELLANEOUS:

ABA *Standards Relating to the Defense Function* (Approved Draft, 1971) 6, 7

Amsterdam, Segal and Miller, *Trial Manual 3 for the Defense of Criminal Cases* (1974) 6

Calif. Continuing Education of the Bar, *California Criminal Law Practice* (1974) 6

Casper, *Criminal Courts: The Defendant's Perspective* (1978) 8

Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev., 1125 (1965) 9

Hale, *History of the Pleas of the Crown* (1st Am. ed. 1847) 10

Kahn, *Annals of Law*, New Yorker, Feb. 6, 1971, p. 76 .. 6

Katz, Litwin & Bamberger, *Justice is the Crime: Pretrial Delay in Felony Cases* (1972) 6-7, 8, 9

Martin, *The Prediction of Dangerousness in Mental Health and Criminal Justice*, Pretrial Services Annual Journal, Vol. IV, 3 (1981) 22

Mills, *I Have Nothing to do With Justice*, Life, March 12, 1971, at 62 9

Pretrial Release: A National Evaluation of Practices and Outcomes — Summary and Policy Analysis (August, 1981), Study conducted by The Lazar Institute of Washington, D.C. 20, 21, 22

Table of Authorities Continued

	Page
Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641 (1964)	8
Story on Constitutional Law, 5th ed., Vol. 2.	2
Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wisc. L. Rev. No. 2, 441	9
The Unconstitutional Administration of Bail: Bellamy v. *The Judges of New York City*, 8 Crim.L.Bull. 459 (1972)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2165

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

v.

EUGENE L. HUNT,

Appellee.

On Appeal From
The United States Court of Appeals
For The Eighth Circuit

BRIEF OF AMICI CURIAE THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE

INTEREST OF AMICI CURIAE

The National Legal Aid and Defender Association (NLADA) is a nonprofit organization whose primary purpose is to promote effective legal assistance for indigent persons; its membership includes the majority of public defender offices, coordinated assigned counsel systems, and legal services agencies in the United States, and 2,000 individual members, most of whom are private practitioners.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation whose membership consists of more than 2,000 lawyers throughout the United States, all of whom are primarily engaged in working with the criminal justice system, as advocates, law professors, and judges of the state and federal courts. NACDL's objectives are to promote the proper administration of criminal justice, the protection of individual rights, and the improvement of the Criminal law, its practices and procedures, through study, research, educational programs, and publications.

Both NLADA and NACDL are deeply concerned and troubled by the State of Nebraska's attempt to curtail the precious right of its citizens to bail and the ominous implications of such denial for the future of individual liberty in that State and in this country should this Court uphold that deprivation. In this regard, Amici share the views implicit in the remarks of Justice Story many years ago:

> "The provision [Eighth Amendment] would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct [denial of the right to bail]." (Story on Constitutional Law, 5th ed., Vol. 2, p. 650.)

Space limitations have caused Amici to confine their argument to two primary issues — the effect of the Nebraska bail provision on Sixth Amendment rights, and its validity under the Equal Protection Clause. This is not to imply any lesser concern for the other important constitutional issues herein. In general, Amici fully support the arguments of the Appellee and the views of the Eighth Circuit below.

Both parties have provided written consent to the filing of this brief.

ARGUMENT

I. ARTICLE 1, SECTION 9, OF THE NEBRASKA CONSTITUTION VIOLATES SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF PERSONS ACCUSED OF VIOLENT SEX OFFENSES BY DEPRIVING THEM OF THEIR RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, SELF-REPRESENTATION, AND "THE FULLEST POSSIBLE DEFENSE."

A. The "Traditional Right Of Freedom Before Conviction" Is Directly And Significantly Related To The Rights Protected By The Sixth Amendment.

The important relationship between the right to bail and the rights encompassed by the Sixth Amendment was stressed long ago in *Stack* v. *Boyle*, 342 U.S. 1 (1951). In setting aside as "excessive" the bail settings for various Smith Act defendants, Chief Justice Vinson, writing for an unanimous Court, stated:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle would lose its meaning." (342 U.S. at 4.)

In a concurring opinion, Justice Jackson, joined by Justice Frankfurter, further added that,

> "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until the trial has found them guilty. Without this conditional privilege, even those wrongfully accused are punished by a period of imprisonment while awaiting trial *and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.*" (342 U.S. at 7-8; emphasis added.)

An arbitrary and unjustified revocation of bail during trial was also described by this Court as "unjustified and . . . unwarranted burden upon defendant and his counsel in the conduct of the case," in *Bitter* v. *United States*, 389 U.S. 15, 17 (1967).

A fair trial is, of course, a fundamental requirement of due process. (*In re Murchison*, 349 U.S. 133, 136 (1955). And the right to effective assistance of counsel is essential to a fair trial (*Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963).) Moreover, to ensure the attainment of that important goal, counsel is required at all "critical stages" of a criminal prosecution. (E.g., *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (in-custody interrogations); *Gilbert* v. *California*, 388 U.S. 263 (1967) (lineups); *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (preliminary hearings).) Furthermore, the Sixth Amendment requires that counsel's assistance be "effective and substantial" and not merely *pro forma*. (*Powell* v. *Alabama*, 287 U.S. 45, 53 (1932).) This includes adequate opportunity to investigate and to prepare for trial. (*Id.*, at 58; *Avery v. Alabama*, 308 U.S. 444, 446 (1940). See also, *Wolfs* v. *Britton*, 509 F.2d 304 (8th Cir., 1975) (counsel improperly appointed a mere day and a half before trial); *United States* v. *Venuto*, 182 F.2d 519 (3rd Cir., 1950) (defendant improperly forbidden to confer with counsel during an 18 hour recess).)

Chief Justice Burger has observed that, "[B]oth the 'spirit and the logic' of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense. . . ." (*Faretta* v. *California*, 422 U.S. 806, 840 (1974) (dissenting opinion).) That Amendment has been described by this Court as "constitutionaliz[ing] the right in an adversary trial to make a defense as we know it," and not merely that such defense "shall be made *for* the accused, [but that] it grants to the accused *personally* the right to make his defense." (*Id.*, at pp. 818-819; emphasis added.)

Obviously, the Nebraska bail provision significantly affects the Sixth Amendment right of self-representation, let alone the right to effective assistance of counsel. Can there be any doubt but that Nebraska's denial of bail to persons accused of violent sex offenses virtually emasculates their right of self-representation? And, surely, such denial of bail must be deemed, at a minimum, to significantly hamper what Chief Justice Burger described as the Sixth Amendment right of "every person accused of crime [to] receive the fullest possible defense."

This Sixth Amendment right of "every person accused of crime [to] receive the fullest possible defense" lies at the heart of the issue of the constitutionality of the Nebraska bail provision. If, indeed, "the traditional right to freedom before conviction permits the unhampered preparation of a defense" — as stated thirty years ago in *Stack* v. *Boyle, supra*, then it cannot be doubted that the Nebraska provision denying such freedom to accused sex offenders cannot stand. Despite this clear language, appellant asserts it is "fallacious" to contend that an accused "has a constitutional right to be free from custody after being charged with a crime in order to assist in the preparation of his defense." (Appellant's brief, hereinafter "BOM," p. 36.) Utterly ignoring *Faretta* and the entire " 'spirit and logic' " of the Sixth Amendment, appellant also erroneously asserts that an accused is entitled to nothing more than the right "to consult with his attorney" and for his attorney to be "given adequate time and opportunity to prepare his defense." (BOM 36)

Appellant's only support for this contention is the further assertion that, "The logical extension of the appellee's reasoning would be to render unconstitutional . . . all pretrial detentions, including those situations where a reasonable bail has been fixed which the accused is unable to meet." (BOM 36)

The short answer to this argument is that it simply begs the question of the validity of the State of Nebraska's complete

denial of *any* bail at all for alleged violent sex offenders. Obviously, if an accused cannot provide "reasonable bail," then under the "traditional right to freedom before conviction," referred to in *Stack* v. *Boyle, supra,* an accused must be detained in deference to the State's interest of assuring the defendant's appearance. However, the State of Nebraska, in this case, urges a radical departure from that "traditional right," contending that irrespective of an accused's ability to give reasonable assurance of appearance, he may be imprisoned on the basis of the "heinous nature" of the offense. In another context, Justice Stevens has warned that if such a doctrine were ever adopted, . . . it would work a fundamental change in the character of our free society." (*Bell* v. *Wolfish,* 441 U.S. 520, 579 (1979) (dissenting opinion).)

B. The Denial Of Bail Has Severe Adverse Effects On The Exercise Of Sixth Amendment Rights.

The adverse practical effects of pretrial imprisonment on an accused's ability "to receive the fullest possible defense" under the Sixth Amendment is indisputable. These effects include impairment of the ability of the accused to personally locate and confer with potential defense witnesses. (*Cf., Smith* v. *Hooey,* 393 U.S. 374, 379-380 (1969).) It also significantly detracts from counsel's duty to investigate thoroughly the facts and law of the case. (See ABA *Standards Relating to the Defense Function* (Approved Draft, 1971) Std. 4.1.) In the conduct of such investigation, the accused's assistance can be vital to location of defense witnesses, especially those in low-income, minority neighborhoods where residents are often suspicious and uncooperative. (See Amsterdam, Segal and Miller, *Trial Manual 3 for the Defense of Criminal Cases* (1974), sec. 75 A, p. 1-61; Calif. Continuing Education of the Bar, *California Criminal Law Practice* (1974), sec. 3.9, p. 113.)[1]

---

[1] An example of the value of a defendant's assistance in locating witnesses was portrayed in an article in the *New Yorker* magazine. (Kahn, *Annals of Law,* New Yorker, Feb. 6, 1971, p. 76, reported in Katz, Litwin &

An accused's ability to exercise his Sixth Amendment rights is further affected by the adverse physical conditions of most jails, by restricted telephone and visiting privileges, and by limited opportunity to consult privately with counsel. Attorney-client consultations are severely hampered by the lack of private interview rooms in many jails, and the travel time and frequent delay experienced by lawyers in gaining entry and access to their clients in pretrial custody. These circumstances impair attorney-client communications and rapport, which are so vital to effective assistance of counsel. They also generate a vicious cycle of hostility and distrust between attorneys and clients that is the very antithesis of the trust and confidence that are essential to effective representation. (See ABA *Standards Relating to the Defense Function, supra,* Std. 3.1, p. 201.) This was aptly described in a study of 1,660 felony defendants in pretrial custody in Cleveland, Ohio, reporting:

> "An accused in jail is of little value to his attorney during the preparation of his defense. Unlike [the bailed defendant], he cannot look for witnesses or personally contact anyone who might be able to assist in his trial defense, and his attorney must consequently assume complete investigatory responsibility. In many ways the jailed defendant is an absolute liability to his defense counsel, since the attorney must go to the jail every time he wants to see his client or consult with him on a particular fact.
>
> "Frequently, the defendant in jail is virtually forgotten by his attorney; rather than consult with his client every time a

---

Bamberger, *Justice Is The Crime: Pretrial Delay in Felony Cases* (1972) pp. 149-150.) The defendant (Thomas Goins) was arrested for possession of 600 glassine envelopes containing heroin which he had turned in to the police, claiming he had found the contraband on a New York City street. His employer helped him make bail and supplied him with a competent attorney. Under the latter's direction, he located witnesses to the event, which had occurred the night before, resulting in the dismissal of the charges. Had Goins been unable to secure his quick release and to return to the scene, the witnesses who had seen him pick up the envelopes in the street would probably not have been located.

> question comes up, the attorney must defer looking into the matter until it is convenient to visit the jail. The jails are filled with defendants who have been waiting for trial for several months and who complain bitterly that in all that time they have seen their attorneys only once or twice." (Katz, *Justice Is The Crime, op. cit. supra,* p. 150.)

The difficulties experienced by public defenders in conferring with incarcerated indigent clients may well explain the deep distrust and unfavorable attitude that typify the attitude of most defendants toward public defenders. (See Casper, *Criminal Courts: The Defendant's Perspective* (1978) 33, 35-36.)

The deleterious effects of pretrial imprisonment have been well documented in several studies over the past 20 years. (See Rankin, *The Effect of Pretrial Detention,* 39 N.Y.U.L. Rev. 641, 642 (1964); *The Unconstitutional Administration of Bail: Bellamy* v. *The Judges of New York City,* 8 Crim.L.Bull. 459 (1972); Katz, *Justice Is The Crime, op. cit. supra,* p. 151.) Each of these studies was controlled for variable factors, such as prior record, the amount of bail set, seriousness of the charge, type of counsel, etc., and they all found a substantial disparity in case dispositions based upon whether or not the defendant was in pretrial custody. The New York City study, which was the most sophisticated, found that a first offender in pretrial detention was three times more likely to be convicted and was more than twice as likely to receive a prison sentence *than a released defendant with more than ten prior arrests!* (*The Unconstitutional Administration of Bail, op. cit. supra,* 8 Crim.L.Bull. at 460.) When the factors of seriousness of the crime, prior criminal record, family ties and employment status were controlled, detained defendants were 41% more likely to be convicted and sentenced to prison than those released. Pretrial status was found to be more than three times as important as either the seriousness of the crime charged or prior record in determining whether a defendant would be convicted and sentenced to prison. In fact, pretrial status was more important than all other factors combined. (*Id.,* at 480-481).

Professor Foote in evaluating Professor Rankin's study data concluded that among the major reasons for this disparity were loss of employment, affecting a defendant's ability to earn a fee to employ his own counsel (as well as ability to obtain probation and support his family), and poorer legal representation due to the adverse physical environment of the interview process and the remoteness of the jail. (Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev., 1125, 1147 (1965).) Similarly, Professor Katz and his colleagues cited the ability of the bailed defendant to "build a record," i.e., employment, family ties, exemplary conduct, during delayed disposition. (Katz, *Justice is the Crime, op. cit. supra*, p. 152.) Another commentator cited the pressure of miserable jail conditions and the delays in getting to trial causing in-custody defendants to waive their rights and plead guilty. (Thaler, *Punishing The Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wisc. L. Rev. No. 2, 441, 457-458.)[2]

---

[2] The insidious pressure of pretrial imprisonment on the innocent to give up their Sixth Amendment rights was poignantly illustrated in the dialogue between an attorney and his client, reported in Mills, *I Have Nothing To Do With Justice*, Life, March 12, 1971, at 62. . . . the defendant was told that if he were to plead guilty he would "walk today," he offered to plead guilty, yet insisted upon his innocence. But the attorney told him that his plea would not be accepted if he was not "guilty of something." Whereupon the defendant insisted that he "didn't do nothing," and his attorney replied:

" 'Then you'll have to stay in and go to trial.'

" 'When will that be?' 'In a couple of months. Maybe longer.'

"Santiago has a grip on the bars. 'You mean if I'm guilty I get out today?'

" 'Yes.' . . .

" But if I'm innocent, I got to stay in?'

" 'That's right.' . . .

"It's too much for Santiago. He lets go of the bars, takes a step back, shakes his head, turns around and comes quickly back to the bars.

" 'But, man' ____ ."

The State of Nebraska in its bail provision would now extend these adversities that afflict the Sixth Amendment rights of those unable to afford bail or who are otherwise unable to give assurance that they will appear in court. By a strange twist of logic, appellant attempts to justify this by the argument that unless this Court upholds the constitutionality of this new imposition, the Court will have to remedy other, existing evils. Thus, by this logic, new evils are justified on the basis of old ones! And by this argument, this Court is asked to allow Nebraska to deny the "traditional right of freedom from conviction [which] permits the unhampered preparation of a defense" to those charged with the "heinous" offense of violent sexual assault — who, if innocent and the victims of incriminating circumstances, are most in need of the benefits of the Sixth Amendment, i.e., "the fullest possible defense."

C. Defendants Accused Of Heinous Sex Offenses Must Be Accorded The Fullest Possible Protection Under The Sixth Amendment.

The facts of this case present a remarkable irony in light of the historic recognition given by our Anglo-American law that " 'rape . . . is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.' " (*People* v. *Rincon-Pineda*, 14 Cal.3d 864, 874, 123 Cal.Rptr. 119, 538 F.2d 247 (1975), quoting 1 Hale, *History of the Pleas of the Crown* (1st Am. ed. 1847), p. 635.) Lord Chief Justice Mathew Hale of the King's Bench, 1671-1676, was the source of that observation which was based upon his long experience in presiding at trials of rape charges, and it became a standard cautionary instruction given to juries in such cases in this country as well as England over the next three centuries.[3]

---

[3] Examples of recent decisions upholding the instruction include, *Beasley* v. *State*, 258 Ark. 84, 522 S.W.2d 365 (1975); *People* v. *Carr* (Colo. App. 1975) 541 P.2d 104; *Kennedy* v. *State* (Wyo. 1975) 470 P.2d 372, *cert. denied*, 401 U.S. 939. See also, Anno. 92 ALR2d 866.)

California's experience with this cautionary instruction is especially relevant to the issue presented in this case. Until 1975, California courts were required to give this cautionary instruction in all sex offense prosecutions. However, at that time, in *People* v. *Rincon-Pineda, supra,* the California Supreme Court ruled that the instruction would no longer be "mandatory." In arriving at that conclusion, former Chief Justice Wright, the author of the court's opinion, engaged in an extensive historic analysis of the instruction. He concluded that the admonition to juries that rape was easily made and hard to defend was no longer necessary because of the increased protection provided to criminal defendants accused of such offenses in modern trials by virtue of rights guaranteed under the Sixth Amendment! Thus, he observed that,

> ". . . [F]undamental precepts of due process [presumption of innocence and proof beyond a reasonable doubt] . . . [and] [t]he rights of an accused to present witnesses in his defense and to compel their attendance, subsequently enshrined in the Sixth Amendment, [were] barely nascent in the 17th Century. . . . Most importantly of all, in the context of a rape case, one accused of a felony in [Lord Chief Justice] Hale's day had no right whatsoever to the assistance of counsel . . ." (14 Cal.3d at 878)

In language fraught with vital significance to this case, Chief Justice Wright concluded:

> ". . . Considering that under the Anglo-Saxon adversarial system of justice 'when a prisoner is undefended his position is often pitiable, even if he has a good case' (1 Stephen, *supra,* at p. 442) [History of the Criminal Law of England (1833)], we recognize that there may well have been merit to Hale's assertion that a prosecution for rape was an ideal instrument of malice, since it forced an accused, on trial for his life, to stand alone before a jury inflamed by passion and attempt to answer a carefully contrived story without benefit of counsel, witnesses, or even a presumption of innocence. But the spectre of

> wrongful conviction, whether for rape or for any other crime, has led our society to arm modern defendants with the potent accouterments of due process which render the additional constraint of Hale's caution superfluous and capricious." (*Ibid.*)

We do not suggest that it is the purpose of the State of Nebraska, under Article I, Section 9, of its constitution to revert to the ancient practices our nation's founders sought to avoid by means of the Sixth Amendment, yet it is clear that Nebraska has made one small, but significant, backward step in that direction. This requires reminder of the classic admonition by Justice Bradley in *Boyd* v. *United States*, 116 U.S. 616, 635 (1885), that,

> ". . . It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

II. ARTICLE 1, SECTION 9, OF THE NEBRASKA CONSTITUTION VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DEPRIVING PERSONS ACCUSED OF VIOLENT SEX OFFENSES OF EQUAL PROTECTION OF THE LAW.

The Appellant denies that the so-called "strict scrutiny test" for equal protection violations governing "fundamental rights" applies. This is based on the erroneous premise that the right to bail is not "fundamental." Appellant finds no support for that premise in any holding of this Court. On the contrary, *Stack* v. *Boyle, supra,* and the other authorities discussed above under Point I clearly oppose it. Since Appellant has not attempted to justify Nebraska's discriminatory bail classification under the "strict scrutiny" standard, he apparently concedes that the provision cannot pass constitutional muster under that test. Appellant's argument also fails to justify the classification under the lesser, "rational relationship test."

A. Denial Of The Right To Bail To Persons Accused Of Violent Sex Offenses Is Subject To The "Strict Scrutiny Test" Of Equal Protection.

An analysis of what constitutes deprivation of "fundamental rights" for the purpose of the "strict scrutiny" equal protection test was presented in *San Antonio Independent School District* v. *Rodrigues*, 411 U.S. 1 (1973), which involved the validity of the Texas financing system for public school education. The issue whether "education" was "fundamental" was determined by "assessing whether . . . a right to education [was] explicitly or implicitly guaranteed by the Constitution." (411 U.S. at 33-34). The majority opinion by Justice Powell cited as examples of right, "implicitly guaranteed": the right to vote (*Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1964)) and the right of procreation (*Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Roe* v. *Wade*, 410 U.S. 113 (1973)). The nexus between these rights and any express constitutional provision is obviously far more tenuous than that of the right to bail and the Eighth Amendment!

The *Rodrigues* Court also indicated, in its restatement of the "strict scrutiny test," that, if such "fundamental freedoms" were merely " 'impinge[d] upon,' " that would require the Court to scrutinize the statutory classification to determine if it was " 'not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest.' " 411 U.S. at 34, n. 73, quoting from *Eisenstadt* v. *Baird*, 405 U.S. 438, 447, n. 7 (1972).) Such "impingement," as distinguished from outright denial, was further emphasized by the Court in distinguishing the facts of the other cases (such as those involving the right to vote and the right to procreation), wherein it had applied "strict scrutiny," — noting that those cases "involve[d] legislation which [had] 'deprived,' 'infringed,' or 'interfered' with the free exercise of some fundamental personal right or liberty." (411 U.S. at 37-38) In contrast to those cases, the Court found that the Texas education financing

scheme was "affirmative and reformatory," and therefore, not subject to that strict standard.

In the present case, there can be no doubt that the "free exercise" of a "fundamental personal right or liberty," has been " 'deprived,' " " 'infringed,' " or " 'interfered' " with — viz., the "traditional right to freedom before conviction," explicitly or implicitly guaranteed under the Eighth Amendment and under the Sixth Amendment and under the Sixth Amendment right to "receive the fullest possible defense." Accordingly, the "strict scrutiny" test must be applied and requires that the Nebraska provision be declared invalid under the Equal Protection Clause.

B. Even If Denial Of Bail Does Not Constitute Interference With A Fundamental Right, The Nebraska Bail Provision Is Invalid Under The "Rational Relationship Test."

Appellant asserts that the "differing treatment of sexual offenders apart from other criminal offenders" under the Nebraska bail provision is "reasonable in that it is relevant to the legitimate state purpose of protecting society." (BOM 26). However, Appellant's six page argument in support of this contention offers not one iota of proof to support that assertion. Appellant has simply failed to meet the requirement of showing, "at a minimum, that [the] statutory classification bear[s] some rational relationship to a legitimate state purpose." (*Weber* v. *Aetna Casualty and Surety Company*, 406 U.S. 164, 172 (1972).)

At the conclusion of Appellant's six page discussion of the law, Appellant baldly reasserts that, "[t]he people of the State of Nebraska have reasonably determined that the crime of first degree sexual assault is distinct from other crimes [justifying denial of bail] based on the undisputed fact that rape is of such a heinous nature as to pose a grave threat to society." (BOM 31-32). The problem with this argument is that it merely begs the question whether or not the discriminatory classification bear[s] some rational relationship to a legitimate state purpose."

Surely, it is also an "undisputed fact" that *other* crimes are equally, if not more, heinous, and furthermore, under Nebraska law, such crimes carry even heavier penalties, as detailed in Appellee's brief. Yet the people of the State of Nebraska have not denied bail to those accused of such crimes — including, among others, shooting or stabbing with intent to kill, robbery, kidnapping, arson, and burglary with explosives. Appellant has utterly failed to explain how the crime of first degree sexual assault is any more "heinous" than those crimes, so as to warrant the discriminatory classification that is in issue here. All that Appellant's argument seems to say is that the crime of first degree sexual assault has been "reasonably determined" to be distinct and to warrant denial of bail simply because the people of the State determined that bail should be denied. The mere statement of that argument demonstrates its absurdity.

The denial of bail has traditionally been limited to capital offenses. As explained by the court below, that concept is "at least arguably consistent with one of the purposes of bail. . . . to provide reasonable assurance that the accused would appear for trial and sentencing if convicted. . . . [and that] '. . . it had been thought that most defendants facing a possible death penalty would likely flee regardless of what bail was set, [whereas] those facing only a possible prison sentence would not if bail were sufficiently high.' *United States* v. *Kennedy*, 618 F.2d 557, 559 (9th Cir., 1980)." (*Hunt* v. *Murphy*, 648 F.2d 1148, 1160 (8th Cir., 1981). No such justification has even been suggested by Appellant in the case at bar. On the contrary, Appellant has relied solely upon the "heinous nature" of rape — "pos[ing] a grave threat to society." (BOM 32.)

The opposite conclusion may be drawn from this Court's decision striking down the death penalty for the crime of rape as cruel and unusual in *Coker* v. *Georgia*, 433 U.S. 584 (1977), which was based, among other grounds, on the fact that at the time of the decision, of the 16 states that had authorized capital

punishment for rape prior to *Furman* v. *Georgia*, 408 U.S. 238 (1972), only three had reenacted the death penalty for that offense afterwards. (433 U.S. at 593-594) And while the Court acknowledged that rape deserved "serious punishment," nevertheless,

> ". . . in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if not more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." (433 U.S. at 598)

Accordingly, the death penalty was held to be excessive for the rapist.

In light of *Coker*, it is clear that no analogy can be drawn, as seems implicit in the Appellant's argument, that the crime of rape, like the crime of murder, justifies the denial of the fundamental right to bail, due to its "heinous nature." *Coker's* reference to the treatment of rape in other States is also instructive here since Nebraska is the *only* State in the Union that has a law denying bail for the crime of rape.

Proper application of the "rational basis test" in this case must rest upon the principles enunciated in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966). The facts of that decision are pertinent. New York statutes permitted continued confinement of convicted criminals who were mentally ill beyond their sentences without a jury trial, as afforded others, and based on mere administrative determinations. Not unlike the argument in the case at bench, the State argued that its classification was reasonable since such persons were not only insane but had proven criminal tendencies as shown by their past criminal records.

And like the present case, the State courts had accepted that argument.

In reversing that judgment, this Court first set forth its classic statement that, "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." (383 U.S. at 111). Applying this rule to the facts, the Court acknowledged that while a reasonable distinction for determining the type of custodial or medical care could be made on the basis of whether mentally ill persons were either insane or dangerously insane, that classification had "no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*." (*Id.* (Emphasis in original).)

Similarly, in the present case, the State of Nebraska contends that there is a rational basis for denial of bail to defendants charged with rape because of the "heinous nature" of that offense — just as New York State argued that it could classify the insane on the basis of whether they were "dangerously insane." But, as in *Baxstrom*, while the nature of the offense and the severity of its penalty may well determine conditions of release and the amount of bail to insure appearance in court, etc., a classification based on the "heinous nature" of the offense, "has no relevance whatever in the context of the opportunity [to make bail] *at all*." (*Id.*, at p. 111) And like *Baxstrom*, this classification must be deemed "capricious" in light of the fact that the "full benefit" of bail is afforded those charged with equally heinous offenses, such as, shooting or stabbing with intent to kill (§ 28-410, Nebraska Statutes Reissue of 1975), etc. Like *Baxstrom*, "this distinction contradicts all semblance of rationality of the classification." (*Id.*, at 115)

Jackson v. *Indiana*, 406 U.S. 715 (1972), is also instructive here. That decision invalidated an Indiana statute that declared unconstitutional a discriminatory classification of accused per-

sons found presently insane and unable to stand trial. Unlike other alleged mentally ill persons, such defendants were deprived of substantial rights accorded to persons committed under the civil commitment procedures. In a unanimous opinion, authored by Justice Blackmun, the Court sustained that contention, under *Baxstrom* v. *Herold, supra*. The fact of pending criminal charges was held not sufficient to justify such discrimination, and, in language pertinent to the present case, the Court noted that, "[I]f criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, *the mere filing of criminal charges surely cannot suffice*." (406 U.S. at 724. Emphasis added.)

Like the above statutes, the Nebraska bail provision denies, at the very least, the important "procedural and substantive protection" of bail to a particular class of defendants — those charged with violent sexual offenses. The State purports to justify this classification on the basis of the "heinous nature" of rape (BOM 32), yet it has utterly failed to show that "the distinction made ha[s] some relevance to the purpose for which the classification is made." (*Baxstrom, supra*, 383 U.S. at 111.)

The real question, as indicated by the *Baxstrom-Jackson* analysis, is whether or not the classification of alleged violent sex offenders — as distinguished from alleged attempted killers, kidnappers, robbers, etc. — has relevance "in the context of the opportunity" to post bail. (*Id.*) Appellant has provided no proof whatever of any basis for such discrimination, but has merely asserted that the people of the State "reasonably determined that the crime of first degree sexual assault is distinct from other crimes [and] that rape is of such a heinous nature as to pose a grave threat to society." (BOM 31-32). Similarly, the briefs of amici curiae essentially echo this unsupported assertion and also fail to satisfy the requirement.

The brief of "Laws at Work" (L.A.W.) alludes to this question, stating that, "[A] key issue in the instant case is that of the dangerousness of accused rape offenders *while awaiting trial*." (L.A.W. 17. Emphasis in original.) But, after so stating, that brief merely provides data on the incidence of repeat offenses for convicted and accused rapists and other offenders — it does *not* address what it referred to earlier as the "key issue" of the "dangerousness of accused rape offenders *while awaiting trial*."

Even more significantly the L.A.W. data entirely contradicts any suggestion that rape offenders have a higher recidivist rate. According to their charts on page 18, the incidence of repeat offenses by rapists *is no greater and is often less than* repeat offenses by other offenders. Thus, under the chart labeled, "Table 2, Offender Arrest Record," the recidivist rate for *offenders* with previous arrest records for rape range from a low of 17.5% to a high of 27.8%, which is *substantially below* the recidivist rates for repeat offenders in the "other violent" category, which range *from a low of 28.6% to a high of 40.6%!* Similarly, the chart entitled, "Table 3, Accused With Previous Arrest Records," shows that the previous arrest rates for *alleged* rapists range from a low of 16% to a high of 26%, whereas arrest record rates for persons accused of "other violent offenses" range *from a low of 22% to a high of 38%!*

Thus, the L.A.W. brief data shows that those accused of and convicted for other crimes have substantially higher recidivist rates! And thus, any implication that the Nebraska statute's classification — as it relates to the denial of bail — is somehow rationally related to a higher incidence of repeat offenses by such accused persons is entirely negated.

C. The Latest Available Empirical Data Provides No Support For Either A "Necessary" Or A "Rational" Relationship Between The Classification Herein And Denial Of Bail.

The most recent empirical study of pretrial release practices in eight jurisdictions throughout the country[4] provides important new data on court appearance performance and pretrial criminality. This data is inconsistent with common notions about those subjects and contradicts any theory that the Nebraska bail classification is either "necessary" or even "rationally" justifiable as a measure to prevent crime or to ensure appearances in court by persons accused of violent sex offenses.

The study was conducted by The Lazar Institute of Washington, D.C., and reported in *Pretrial Release: A National Evaluation of Practices and Outcomes — Summary and Policy Analysis* (August, 1981). It was funded by grants from the National Institute of Justice, U.S. Department of Justice. 3,488 defendants were included in the eight-site sample, 85% of whom secured release at some point before trial. 825 defendants were released on financial conditions, and 2,129 were released on nonfinancial conditions; 510 persons were detained. (Lazar Study, *op. cit. supra*, p. 11, Table 4.)

In general, the study found that "the overwhelming majority, 84 percent, of all released defendants in the eight sites had *no* pretrial arrests." (*Id.*, at 20). The overall pretrial arrest rate was 16%, with rates for individual jurisdictions ranging from 7.5% to 22.2%. (*Ibid.*) Pretrial rearrest rates were broken down by specific charge. For the category "Forcible rape," the sample contained 17 defendants who were released and 7 defendants who were detained. Of the released defendants, 14 were *not* rearrested, or 84% — precisely the same proportion as that of

---

[4] Baltimore City, Maryland; Baltimore County, Maryland; Washington D.C.; Dade County (Miami), Florida; Jefferson County (Louisville), Kentucky; Pima County, (Tucson), Arizona; Santa Cruz County, California; and Santa Clara County (San Jose), California.

the general pretrial release population! (*Id.*, at 73, Table A-4). And of the 3 defendants who were rearrested, only 1 was convicted of the pretrial rearrest charge. (*Id.*, at 74, Table A-5).

Higher rearrest and conviction rates were reported for *all* other serious crimes, except embezzlement! (*Id.*, at 73). Among these higher rearrest rates were, those who had been released on charges of "Murder, manslaughter" (21.4%), "Robbery" (16.9%), "Aggravated assault" (16.7%), "Burglary" (27.6%), "Larceny, theft" (24.1%), "Auto theft" (29.0%), "Simple assault" (16.2%), "Arson" (30.4%), "Forgery, counterfeiting" (33.8%), "Fraud" (18.3%), "Stolen property" (21.9%), and "Malicious destruction" (18.4%). (*Ibid.*)

The data on failure to appear rates, however, showed that five of the 17 released on forcible rape charges (28.9%) had failed to appear, which was the highest rate, with comparably high rates for "Forgery" (20.8%) and "Fraud" (20.9%), and "Prostitution, vice" (27.9%). (*Id.*, at 72, Table A-3). However, lest any great significance be given to this, the study also reported that overall, 29% of the defendants in all categories who failed to appear had returned to court of their own volition within 30 days, and an additional 16% returned voluntarily afterwards. The others were either returned to court as a result of an arrest (about one-third) or were tried in absentia or forfeited bail (6%). 17% of all the defendants who failed to appear were still at large when the data was collected, leaving an overall "fugitive" rate of just 2%. (*Id.*, at 15).

With respect to the ability to predict court appearance outcomes, the study could not "identify a set of characteristics that could be used to predict with reasonable accuracy the defendants who would fail to appear," and concluded that this reflected "the difficulty of trying to predict an event that is

relatively rare and experienced by persons with diverse characteristics." (*Id.*, at 18)[5]

Thus, it is clear, from this most recent empirical study that it cannot be concluded that the Nebraska bail provision's classification of first degree sexual offenders is either "necessarily" or "rationally" related to any purpose for which bail may be denied. It is simply irrational to deny to this category of accused persons "the traditional right to freedom [which] permits the unhampered preparation of a defense," when others, similarly situated and charged with offenses that are equally, if not more, heinous are accorded that fundamental right.

---

[5] With regard to the ability to predict "dangerousness," empirical studies also show that such predictions are "grossly inaccurate," and that incorrect predictions occurred in more than half, and up to 99%, in recent efforts. Martin, *The Prediction of Dangerousness in Mental Health and Criminal Justice*, Pretrial Services Annual Journal, Vol. IV, 3, 14 (1981).

CONCLUSION

For the above reasons, amici curiae respectfully request that the judgment of the Eight Circuit be affirmed.

Respectfu'ly submitted,

NATIONAL LEGAL AID
and DEFENDER ASSOCIATION
and NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
Amici Curiae In Support of Appellee

By _____
SHELDON PORTMAN
Public Defender, Santa Clara
County, California.